



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[FRL-9627-3]

Notice of a Project Waiver of the American Recovery and Reinvestment Act of 2009 (ARRA) to the Cuyahoga County Board of Health for the Bear Creek Restoration Project in Warrensville Heights, Ohio, and the Laurel Creek Restoration Project in Twinsburg, Ohio

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The EPA is hereby granting a project waiver of the Buy American requirements of ARRA Section 1605 under the authority of Section 1605(b)(2) [manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality] to the Cuyahoga County Board of Health (County) for the Bear Creek Restoration Project in Warrensville Heights, Ohio, and the Laurel Creek Restoration Project in Twinsburg, Ohio, for coconut fiber (coir) woven mats to be installed as part of their stream bank stabilization/restoration projects. This is a project-specific waiver and only applies to the use of the specified product for the ARRA funded projects being proposed. Any other ARRA project that may wish to use the same product must apply for a separate waiver based on project specific circumstances. The coir woven mats under consideration are manufactured in India and Sri Lanka and meet the projects' technical specifications and requirements. The Regional

Administrator is making this determination based on the review and recommendations of EPA Region 5's Water Division. The County has provided sufficient documentation to support each individual request. The Assistant Administrator of the Office of Administration and Resources Management has concurred on this decision to make an exception to Section 1605 of the ARRA.

This action permits the purchase of coir woven mats for the proposed projects that may otherwise be prohibited under Section 1605(a) of the ARRA.

EFFECTIVE DATE: [Insert date of publication in Federal Register]

FOR FURTHER INFORMATION CONTACT: Andrew Lausted, SRF Program Manager, (312) 886-0189, or Meonii Bristol, SRF Program Manager, (312) 353-4716, EPA Water Division, State and Tribal Branch, 77 West Jackson Boulevard, Chicago, IL 60604.

SUPPLEMENTARY INFORMATION: In accordance with ARRA Section 1605(c) and pursuant to Section 1605(b)(2) of Public Law 111-5, Buy American requirements, EPA hereby provides notice that it is granting a project waiver to the Cuyahoga County Board of Health for the Bear Creek Restoration Project in Warrensville Heights, Ohio, and the Laurel Creek Restoration Project in Twinsburg, Ohio, for the acquisition of coir woven mats manufactured outside of the United States.

Section 1605 of the ARRA requires that none of the appropriated funds may be used for the construction, alteration, maintenance, or repair of a public building or public work unless all of

the iron, steel, and manufactured goods used in the project are produced in the United States, or unless a waiver is provided to the recipient by the head of the appropriate agency, here EPA. A waiver may be provided if EPA determines that (1) applying these requirements would be inconsistent with the public interest; (2) iron, steel, and the relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; (3) inclusion of iron, steel, and the cost of the overall project by more than 25 percent.

These manufactured goods will be used for streambank stabilization and erosion control. Only coir woven mats meet the specific needs of each project because they are completely biodegradable, have a high resistance to shear stresses and flows, and are visually unobtrusive. The County contends that coconut fibers are more durable than straw and other materials used in alternative mat products, and they do not require the incorporation of polypropylene and/or other synthetic products that are not 100% biodegradable.

The April 28, 2009, EPA HQ Memorandum, “Implementation of Buy American provisions of Public Law 111-5, the ‘American Recovery and Reinvestment Act of 2009,’” defines reasonably available quantity as “the quantity of iron, steel, or relevant manufactured good is available at the time needed and place needed, and in the proper form or specification as specified in the project plans and design.” The OMB ARRA Buy American Guidance cites the Federal Acquisition Regulation (FAR) as an appropriate reference for availability waiver inquiries. Specifically, the OMB Guidance at Section 176.80(a)(1) states (at 77 FR 18452) that “The

determinations of nonavailability of the articles includes “Fibers of the following types:***coir,” thereby establishing a presumption of lack of U.S. availability. The FAR procedures at 48 CFR 25.103(b)(1) specified as required in the OMB Guidance state that: (1)(i) A nonavailability determination had been made for the articles listed in 25.104. This determination does not necessarily mean that there is no domestic source for the listed items, but that domestic sources can only meet 50 percent or less of total U.S. government and nongovernment demand; (ii) Before acquisition of an article on the list, the procuring agency is responsible to conduct market research appropriate to the circumstances, including seeking of domestic sources. The applicant met the procedures specified for the availability inquiry as appropriate to the circumstances by conducting online research and contacting suppliers, and all sources indicated that coir woven mats are only manufactured outside of the United States.

EPA’s national contractor prepared a technical assessment report based on the submitted waiver request. The report determined that the waiver request submittal was complete, that adequate technical information was provided, and that there were no significant weaknesses in the justification provided. Therefore, based on the information provided to EPA and to the best of our knowledge at this time, the coir woven mats necessary for these projects are not manufactured in the United States, and no other domestically manufactured products can meet the County’s project performance specifications and requirements.

EPA has also evaluated the County’s request to determine if its submission is considered late or if it could be considered timely, as per the OMB Guidance at 2 CFR §176.120. EPA will

generally regard waiver requests with respect to components that were specified in the bid solicitation or in a general/primary construction contract as “late” if submitted after the contract date. However, EPA could also determine that a request be evaluated as timely, though made after the date that the contract was signed, if the need for a waiver was not reasonably foreseeable. If the need for a waiver *is* reasonably foreseeable, then EPA could still apply discretion in these late cases as per the OMB Guidance, which says “the award official *may* deny the request.” For those waiver requests that do not have a reasonably unforeseeable basis for lateness, but for which the waiver basis is valid and there is no apparent gain by the ARRA recipient or loss on behalf of the government, then EPA will still consider granting a waiver.

In this case, there are no U.S. manufacturers that meet the County’s project specifications for the purchase of coir woven mats. The loans for both projects were signed on January 28, 2010, making them two of the last projects to receive ARRA money in Ohio. Both loans were design/build, meaning that much design work had to be done before construction could be undertaken. Further delaying construction activities was the need to negotiate and sign easement and land-use covenants with neighboring landowners. Therefore, the County was not aware that there were no domestic equivalents for the coir woven mats in question until early 2011. There is no indication that the County failed to request a waiver in order to avoid the requirements of the ARRA, particularly since there are no domestically manufactured products available that meet the project specifications. EPA will consider the County’s waiver request a foreseeable late request, as though it had been timely made since there is no gain by the County and no loss by the government due to the late request.

The purpose of the ARRA is to stimulate economic recovery in part by funding current infrastructure construction, not to delay projects that are “shovel ready” by requiring agencies, such as the County, to revise their standards and specifications. The imposition of ARRA Buy American requirements on such projects otherwise eligible for ARRA State Revolving Fund assistance would result in unreasonable delay and thus displace the “shovel ready” status for this project. To further delay project implementation is in direct conflict with a fundamental economic purpose of the ARRA, which is to create or retain jobs.

EPA has reviewed this waiver request and has determined that the information and supporting documentation provided by the County is sufficient to meet the criteria listed under Section 1605(b) of the ARRA and in the April 28, 2009, “Implementation of Buy American provisions of Public Law 111-5, the ‘American Recovery and Reinvestment Act of 2009’ Memorandum”: **Iron, steel, and the manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality.** The basis for this project waiver is the authorization provided in Section 1605(b)(2) of the ARRA. Due to the lack of production of this item in the United States in sufficient and reasonably available quantities and of a satisfactory quality in order to meet the County’s performance specifications and requirements, a waiver from the Buy American requirement is justified.

The March 31, 2009, Delegation of Authority Memorandum provided Regional Administrators with the authority to issue exceptions to Section 1605 of the ARRA within the geographic

boundaries of their respective regions and with respect to requests by individual grant recipients.

Having established both a proper basis to specify the particular good required for these projects, and that this manufactured good was not available from a producer in the United States, the County is hereby granted a waiver from the Buy American requirements of Section 1605(a) of Public Law 111-5 for the purchase of coir woven mats using ARRA funds as specified in the community's request. This supplementary information constitutes the detailed written justification required by Section 1605(c) for waivers "based on a finding under subsection (b)."

AUTHORITY: Public Law 111-5, section 1605.

Dated: September 15, 2011.

Susan Hedman

Regional Administrator

[FR Doc. 2012-2438 Filed 02/02/2012 at 8:45 am; Publication Date: 02/03/2012]